107TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPT. 107–262
Part 2

RETIREMENT SECURITY ADVICE ACT OF 2001

NOVEMBER 13, 2001.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. THOMAS, from the Committee on Ways and Means, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany H.R. 2269]

[Including cost estimate of the Congressional Budget Office]

The Committee on Ways and Means, to whom was referred the bill (H.R. 2269) to amend title I of the Employee Retirement Income Security Act of 1974 and the Internal Revenue Code of 1986 to promote the provision of retirement investment advice to workers managing their retirement income assets, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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99–006

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Retirement Security Advice Act of 2001".

SEC. 2. PROHIBITED TRANSACTION EXEMPTION FOR THE PROVISION OF INVESTMENT ADVICE.

(a) AMENDMENTS TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.—

(1) IN GENERAL.—Section 408(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1108(b)) is amended by adding at the end the following new paragraph:

"(14) If the requirements of subsection (g) are met—

"(A) the provision of investment advice referred to in section 3(21)(A)(ii) provided by a fiduciary adviser (as defined in subsection (g)(4)(A)) to an employee benefit plan or to a participant or beneficiary of an employee benefit plan,

"(B) the sale, acquisition, or holding of securities or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of securities or other property) pursuant to such investment advice, and

"(C) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of such investment advice.".

(2) REQUIREMENTS.—Section 408 of such Act is amended further by adding at the end the following new subsection:

"(g)(1) The requirements of this subsection are met in connection with the provision of advice referred to in section 3(21)(A)(ii), provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to such plan, in connection with any sale or acquisition of a security or other property for purposes of investment of amounts held by such plan, if—

"(A) in the case of the initial provision of such advice with regard to a security or other property, by such fiduciary adviser to such plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of such advice, at the time of or before the initial provision of such advice, a clear and conspicuous description, in writing (including by means of electronic communication), of—

"(i) all fees or other compensation relating to such advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of such advice or in connection with such acquisition or sale,

"(ii) any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in such security or other property,

"(iii) any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale or acquisition, and

"(iv) the types of services offered by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser,

"(B) in the case of the initial or any subsequent provision of such advice to such plan, participant, or beneficiary, the fiduciary adviser, throughout the 1-year period following the provision of such advice, maintains the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form for availability, upon request and without charge, to the recipient of such advice,

"(C) the fiduciary adviser provides appropriate disclosure, in connection with any such acquisition or sale, in accordance with all applicable securities laws,

"(D) such acquisition or sale occurs solely at the direction of the recipient of such advice,

"(E) the compensation received by the fiduciary adviser and affiliates thereof in connection with such acquisition or sale is reasonable, and

"(F) the terms of such acquisition or sale are at least as favorable to such plan as an arm's length transaction would be.

"(2) A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of such advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

"(3)(A) Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of such investment advice), if—

"(i) such advice is provided by a fiduciary adviser pursuant to an arrangement between such plan sponsor or other fiduciary and such fiduciary adviser for the provision by such fiduciary adviser of investment advice referred to in such section, and

"(ii) the terms of such arrangement require compliance by the fiduciary adviser with the requirements of this subsection.

"(B) Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of advice referred to in section 3(21)(A)(ii). Such plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of such advice.

"(C) Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

"(4) For purposes of this subsection and subsection (b)(14)—

"(A) The term 'fiduciary adviser' means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by such person to the plan or to a participant or beneficiary and who is—

"(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

"(ii) a bank or similar financial institution referred to in section 408(b)(4),

"(iii) an insurance company qualified to do business under the laws of a State,

"(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

"(v) an affiliate of a person described in any of clauses (i) through (iv), or

"(vi) an employee, agent, or registered representative of a person described in any of clauses (i) through (v).

"(B) The term 'affiliate' means an affiliated person, as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3)).

"(C) The term 'registered representative' means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) or section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).".

(b) AMENDMENTS TO THE INTERNAL REVENUE CODE OF 1986.—

(1) EXEMPTION FROM PROHIBITED TRANSACTIONS.—Subsection (d) of section 4975 of the Internal Revenue Code of 1986 (relating to exemptions from tax on prohibited transactions) is amended—

(A) in paragraph (14), by striking "or" at the end;

(B) in paragraph (15), by striking the period at the end and inserting "; or"; and

(C) by adding at the end the following new paragraph:

"(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B), in any case in which—

"(A) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,

"(B) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

"(C) the requirements of subsection (f)(7)(B) are met in connection with the provision of the advice."

(2) ALLOWED TRANSACTIONS AND REQUIREMENTS.—Subsection (f) of such section 4975 (relating to other definitions and special rules) is amended by adding at the end the following new paragraph:

"(7) PROVISIONS RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

"(A) TRANSACTIONS ALLOWABLE IN CONNECTION WITH INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—The transactions referred to in subsection (d)(16), in connection with the provision of investment advice by a fiduciary adviser, are the following:

"(i) the provision of the advice to the plan, participant, or beneficiary;

"(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

"(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

"(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

"(i) in the case of the initial provision of the advice with regard to the security or other property by the fiduciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

"(I) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

"(II) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

"(III) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

"(IV) of the types of services provided by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser, and

"(V) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice,

"(ii) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

"(iii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

"(iv) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

"(v) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

"(C) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under subparagraph (B)(i) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

"(D) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—

"(i) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

"(ii) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

"(iii) in the event of a material change to the information described in subclauses (I) through (IV) of subparagraph (B)(i), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

"(E) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

"(F) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

"(i) FIDUCIARY ADVISER.—The term 'fiduciary adviser' means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—

"(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

"(II) a bank or similar financial institution referred to in subsection (d)(4),

"(III) an insurance company qualified to do business under the laws of a State,

"(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

"(V) an affiliate of a person described in any of subclauses (I) through (IV), or

"(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

"(ii) AFFILIATE.—The term 'affiliate' of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

"(iii) REGISTERED REPRESENTATIVE.—The term 'registered representative' of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section)."

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall apply with respect to advice referred to in section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 or section 4975(e)(3)(B) of the Internal Revenue Code of 1986 provided on or after January 1, 2002.

I. SUMMARY AND BACKGROUND

A. Purpose and Summary

The tax provisions of the bill, H.R. 2269, as amended (the "Retirement Security Advice Act of 2001"), create a new category of prohibited transaction exemptions for investment advice, the investment of assets, and the receipt of fees in connection with retirement plans and accounts, Archer MSAs, and Coverdell education savings accounts. The bill will facilitate the provision of investment advice in connection with retirement savings and enable workers to better manage their retirement assets.

B. Background and Need for Legislation

The provisions approved by the Committee will facilitate the provision of investment advice in connection with retirement savings.

C. Legislative History

committee action

The Committee on Ways and Means marked up the provisions of the bill on November 7, 2001, and ordered the bill reported, as amended, on November 7, 2001, by a roll call vote of 25 yeas and 15 nays, with a quorum present.

II. EXPLANATION OF THE BILL

A. Prohibited Transaction Exemption for the Provision of Investment Advice (Sec. 2(b) of the Bill and Sec. 4975 of the Code)

present law

Present law prohibits certain transactions between an employee benefit plan and a disqualified person.[1] Disqualified persons include a fiduciary of the plan, a person providing services to the plan, and an employer with employees covered by the plan. For this purpose, a fiduciary includes any person who (1) exercises any authority or control respecting management or disposition of the plan's assets, (2) renders investment advice for a fee or other compensation with respect to any plan moneys or property, or has the authority or responsibility to do so, or (3) has any discretionary authority or responsibility in the administration of the plan.

Prohibited transactions include (1) the sale, exchange or leasing of property, (2) the lending of money or other extension of credit, (3) the furnishing of goods, services or facilities, (4) the transfer to, or use by or for the benefit of, the income or assets of the plan, (5) in the case of a fiduciary, any act that deals with the plan's income or assets the for the fiduciary's own interest or account, and (6) the receipt by a fiduciary of any consideration for the fiduciary's own personal account from any party dealing with the plan in connection with a transaction involving the income or assets of the plan. However, certain transactions are exempt from prohibited transaction treatment, for example, certain loans to plan participants.

[1] Similar rules apply under the Employee Retirement Income Security Act of 1974 ("ERISA").

If a prohibited transaction occurs, the disqualified person who participates in the transaction is subject to a two-tier excise tax. The first level tax is 15 percent of the amount involved in the transaction. The second level tax is imposed if the prohibited transaction is not corrected within a certain period and is 100 percent of the amount involved. The prohibited transaction rules apply to a qualified retirement plan, a qualified retirement annuity, an individual retirement account or annuity, an Archer MSA, or a Coverdell education savings account.

REASONS FOR CHANGE

The Committee believes that providing prohibited transaction exemptions will facilitate the provision of investment advice to individuals who are responsible for directing the investment of their retirement assets.

EXPLANATION OF PROVISION

The provision adds a new category of prohibited transaction exemptions in connection with the provision of investment advice with respect to plan assets for a fee if (1) the investment of plan assets is subject to the direction of plan participants or beneficiaries, (2) the advice is provided to the plan or a participant or beneficiary by a fiduciary advisory in connection with a sale, acquisition or holding of a security or other property (an "investment transaction") for purposes of investment plan assets, and (3) certain other requirements are met. Under the provision, the following are exempt from prohibited transaction treatment: (1) the provision of investment advice to the plan, participant or beneficiary, (2) an investment transaction (including any lending of money or other extension of credit associated with the investment transaction) pursuant to the advice, and (3) the direct or indirect receipt of fees or other compensation by a fiduciary advisor or affiliate (or any employee, agent or registered representative of the fiduciary advisor or affiliate) in connection with the provision of the advice or an investment transaction pursuant to the advice.

Under the provision, certain requirements must be met in order for the exemption to apply. When initially providing advice about a security or other property, the fiduciary advisor must provide to the recipient of the advice, on a reasonably contemporaneous basis, written notification of specified information (discussed below) as well as any disclosure required in connection with the investment transaction under any applicable securities laws. In addition, the investment transaction must occur solely at the direction of the recipient of the advice; the compensation received by the advisor and affiliates in connection with the investment transaction must be at least as favorable as an arm's length transaction would be.

The written notification required to be provided by the fiduciary advisor must include information about the following: (1) all fees or compensation to be received by the advisor or an affiliate (including from a third party) in connection with the advice or the investment transaction, (2) any material affiliation or contractual relationship of the advisor or affiliates in the security or other property involved in the investment transaction (3) any limitation to be placed on the scope of the investment advice, (4) the types of services provided by the advisor in connection with the provision of in-

vestment advice, and (5) the advisor's status as a fiduciary of the plan in connection with the provision of the advice. The written notification can be provided electronically. In addition, in connection with the initial advice or subsequent advice, the required information must be provided in currently accurate form at least annually and also when requested by the recipient of the advice and when there is a material change in the information. Any notification (or currently accurate information) must be written in a clear and conspicuous manner, calculated to be understood by the average plan participant, and be sufficiently accurate and comprehensive reasonably to apprise participants and beneficiaries of the required information.

The fiduciary advisor must maintain for at least six years any records necessary for determining whether the requirements for the prohibited transaction exemption were met. A prohibited transaction will not be considered to have occurred merely because records were lost or destroyed before the end of six years due to circumstances beyond the advisor's control.

For purposes of the provision, "fiduciary advisor" is defined as a person who is a fiduciary of the plan by reason of the provision of investment advice to the plan, a participant or beneficiary and who is also (1) registered as an investment advisor under the Investment Advisors Act of 1940 or under State laws, (2) a bank or similar financial institution supervised by the United States or a State, (3) an insurance company qualified to do business under State law, (4) registered as a broker or dealer under the Securities Exchange Act of 1934, (5) an affiliate of any of the preceding, or (6) an employee, agent or representative of any of the preceding or (6) an employee, agent or representative of any of the preceding who satisfies the requirements of applicable insurance, banking and securities laws relating to the provision of advice. "Affiliate" means an affiliated person as defined under section 2(a)(3) of the Investment Company Act of 1940. "Registered representative" means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 or a person described in section 202(a)(17) of the Investment Advisors Act of 1940.

EFFECTIVE DATE

The provision is effective with respect to investment advice provided on or after January 1, 2002.

III. VOTES OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the following statements are made concerning the votes of the Committee of Ways and Means in its consideration of the bill, H.R. 2269.

MOTION TO REPORT THE BILL

The bill, H.R. 2269, as amended, was ordered favorably reported by a roll call vote of 25 yeas to 15 nays (with a quorum being present). The vote was as follows:

Representatives	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Thomas	X			Mr. Rangel		X	

Representatives	Yea	Nay	Present	Representative	Yea	Nay	Present
Mr. Crane	X			Mr. Stark		X	
Mr. Shaw	X			Mr. Matsui		X	
Mrs. Johnson	X			Mr. Coyne		X	
Mr. Houghton	X			Mr. Levin		X	
Mr. Herger	X			Mr. Cardin		X	
Mr. McCrery	X			Mr. McDermott		X	
Mr. Camp	X			Mr. Kleczka		X	
Mr. Ramstad	X			Mr. Lewis (GA)		X	
Mr. Nussle				Mr. Neal	X		
Mr. Johnson	X			Mr. McNulty		X	
Ms. Dunn	X			Mr. Jefferson		X	
Mr. Collins	X			Mr. Tanner	X		
Mr. Portman	X			Mr. Becerra		X	
Mr. English	X			Mrs. Thurman		X	
Mr. Watkins	X			Mr. Doggett		X	
Mr. Hayworth	X			Mr. Pomeroy		X	
Mr. Weller	X						
Mr. Hulshof	X						
Mr. McInnis	X						
Mr. Lewis (KY)	X						
Mr. Foley	X						
Mr. Brady	X						
Mr. Ryan	X						

IV. BUDGET EFFECTS OF THE BILL

A. Committee Estimate of Budgetary Effects

In compliance with clause 3(d)(2) of the rule XIII of the Rules of the House of Representatives, the following statement is made concerning the effects on the budget of the revenue provisions of the bill, H.R. 2269, as reported.

The bill is estimated to have the following effects on budget receipts for fiscal years 2002–2006:

ESTIMATED BUDGET EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN H.R. 2269, THE ''RETIREMENT SECURITY ADVICE ACT OF 2001,'' AS REPORTED BY THE COMMITTEE ON WAYS AND MEANS

[Fiscal years 2002–2006, in millions of dollars]

Provision	Effective	2002	2003	2004	2005	2006	2002–06
Add a new category of prohibited transaction exemption for investment advice, certain investments of plan assets, and the receipt of fees in connection with the advice or investments	iapo/a 1/1/02		Negligible Revenue Effect				

Legend for ''Effective'' column: iapo/a=investment advice provided on or after.

Note.—Details may not add to totals due to rounding.

Source: Joint Committee on Taxation.

B. Statement Regarding New Budget Authority and Tax Expenditures Budget Authority

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee states that the bill involves no new or increased budget authority. The Committee further states that the bill does not involve increased tax expenditures.

C. COST ESTIMATE PREPARED BY THE CONGRESSIONAL BUDGET OFFICE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, requiring a cost estimate prepared by the CBO, the following statement by CBO is provided.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, November 9, 2001.

Hon. WILLIAM "BILL" M. THOMAS,
Chairman, Committee on Ways and Means,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2269, the Retirement Security Advice Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Geoffrey Gehardt.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 2269—Retirement Security Advice Act of 2001

H.R. 2269 would amend the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code so that employer-sponsored retirement plans may provide plan participants with direct access to fiduciary advisers. Under current law, employers may not provide participants in their retirement plans with direct access to financial advisers for the purpose of providing individual investment advice.

The Congressional Budget Office and the Joint Committee on Taxation estimate that H.R. 2269 would have a negligible effect on federal spending and revenues. This version of the bill is similar to the version approved by the House Committee on Education and the Workforce on October 3, 2001, and our estimate is unchanged. Because H.R. 2269 would affect receipts, pay-as-you-go procedures would apply to the bill.

In modifying provisions of ERISA and the Internal Revenue Code, the legislation also would establish certain requirements that must be followed by advisers who are provided by plan sponsors. H.R. 2269 would require that fiduciary advisers must disclose to employees all fees, as well as any financial holdings or potential conflicts that could affect their investment advice. Fees collected though such advice would not be subject to the excise taxes imposed by section 4975 of the Internal Revenue Code. The bill would also require advisers to act in the best financial interest of the employee and to maintain records related to such advice for at least six years.

H.R. 2269 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Geoffrey Gerhardt. The estimate was approve by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

V. OTHER MATTERS TO BE DISCUSSED UNDER THE RULES OF THE HOUSE

A. Committee Oversight Findings and Recommendations

With respect to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives (relating to oversight findings), the Committee advises that it was a result of the Committee's oversight review concerning retirement security that the Committee concluded that it is appropriate and timely to enact the revenue provision included in the bill as reported.

B. Statement of General Performance Goals and Objectives

With respect to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee advises that the bill contains no measure that authorizes funding, so no statement of general performance goals and objectives for any measure that authorizes funding is required.

C. Constitutional Authority Statement

With respect to clause 3(d)(1) of the rule XIII of the Rules of the House of Representative (relating to Constitutional Authority), the Committee states that the Committee's action in reporting this bill is derived from Article I of the Constitution, Section 8 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises . . ."), and from the 16th Amendment to the Constitution.

D. Information Relating to Unfunded Mandates

This information is provided in accordance with section 423 of the Unfunded Mandates Act of 1995 (P.L. 104–4).

The Committee has determined that the bill does not contain Federal mandates on the private sector. The Committee has determined that the bill does not impose a Federal intergovernmental mandate on State, local, or tribal governments.

E. Applicability of House Rule XXI 5(b)

Rule XXI 5(b) of the Rules of the House of Representatives provides, in part, that "A bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase may not be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting, a quorum being present." The Committee has carefully reviewed the provisions of the bill, and states that the provisions of the bill do not involve any Federal income tax rate increases within the meaning of the rule.

F. Tax Complexity Analysis

Section 4022(b) of the Internal Revenue Service Reform and Restructuring Act of 1998 (the "IRS Reform Act") requires the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Department of Treasury) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the House Committee on Ways and Means, the

Senate Committee on Finance, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code and has widespread applicability to individuals or small businesses.

The staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that amend the Internal Revenue Code and that have "widespread applicability" to individuals or small businesses.

VI. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

SECTION 408 OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

EXEMPTIONS FROM PROHIBITED TRANSACTIONS

SEC. 408. (a) * * *

(b) The prohibitions provided in section 406 shall not apply to any of the following transactions:

(1) * * *

* * * * * * *

(14) If the requirements of subsection (g) are met—

(A) the provision of investment advice referred to in section 3(21)(A)(ii) provided by a fiduciary adviser (as defined in subsection (g)(4)(A)) to an employee benefit plan or to a participant or beneficiary of an employee benefit plan,

(B) the sale, acquisition, or holding of securities or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of securities or other property) pursuant to such investment advice, and

(C) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of such investment advice.

* * * * * * *

(g)(1) The requirements of this subsection are met in connection with the provision of advice referred to in section 3(21)(A)(ii), provided to an employee benefit plan or a participant or beneficiary of an employee benefit plan by a fiduciary adviser with respect to such plan, in connection with any sale or acquisition of a security or other property for purposes of investment of amounts held by such plan, if—

(A) in the case of the initial provision of such advice with regard to a security or other property, by such fiduciary adviser to such plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of such advice, at the time of or before

the initial provision of such advice, a clear and conspicuous description, in writing (including by means of electronic communication), of—

(i) all fees or other compensation relating to such advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of such advice or in connection with such acquisition or sale,

(ii) any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in such security or other property,

(iii) any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale or acquisition, and

(iv) the types of services offered by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser,

(B) in the case of the initial or any subsequent provision of such advice to such plan, participant, or beneficiary, the fiduciary adviser, throughout the 1-year period following the provision of such advice, maintains the information described in clauses (i) through (iv) of subparagraph (A) in currently accurate form for availability, upon request and without charge, to the recipient of such advice,

(C) the fiduciary adviser provides appropriate disclosure, in connection with any such acquisition or sale, in accordance with all applicable securities laws,

(D) such acquisition or sale occurs solely at the direction of the recipient of such advice,

(E) the compensation received by the fiduciary adviser and affiliates thereof in connection with such acquisition or sale is reasonable, and

(F) the terms of such acquisition or sale are at least as favorable to such plan as an arm's length transaction would be.

(2) A fiduciary adviser referred to in paragraph (1) who has provided advice referred to in such paragraph shall, for a period of not less than 6 years after the provision of such advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this subsection and of subsection (b)(14) have been met. A transaction prohibited under section 406 shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(3)(A) Subject to subparagraph (B), a plan sponsor or other person who is a fiduciary shall not be treated as failing to meet the requirements of this part solely by reason of the provision of investment advice referred to in section 3(21)(A)(ii) (or solely by reason of contracting for or otherwise arranging for the provision of such investment advice), if—

(i) such advice is provided by a fiduciary adviser pursuant to an arrangement between such plan sponsor or other fiduciary and such fiduciary adviser for the provision by such fiduciary adviser of investment advice referred to in such section, and

(ii) the terms of such arrangement require compliance by the fiduciary adviser with the requirements of this subsection.

(B) Nothing in subparagraph (A) shall be construed to exempt a plan sponsor or other person who is a fiduciary from any requirement of this part for the prudent selection and periodic review of a fiduciary adviser with whom the plan sponsor or other person enters into an arrangement for the provision of advice referred to in section 3(21)(A)(ii). Such plan sponsor or other person who is a fiduciary has no duty under this part to monitor the specific investment advice given by the fiduciary adviser to any particular recipient of such advice.

(C) Nothing in this part shall be construed to preclude the use of plan assets to pay for reasonable expenses in providing investment advice referred to in section 3(21)(A)(ii).

(4) For purposes of this subsection and subsection (b)(14)—

(A) The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by such person to the plan or to a participant or beneficiary and who is—

(i) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(ii) a bank or similar financial institution referred to in section 408(b)(4),

(iii) an insurance company qualified to do business under the laws of a State,

(iv) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(v) an affiliate of a person described in any of clauses (i) through (iv), or

(vi) an employee, agent, or registered representative of a person described in any of clauses (i) through (v).

(B) The term "affiliate" means an affiliated person, as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3)).

(C) The term "registered representative" means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) or section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)).

SECTION 4975 OF THE INTERNAL REVENUE CODE OF 1986

SEC. 4975. TAX ON PROHIBITED TRANSACTIONS.

(a) * * *

* * * * * * *

(d) EXEMPTIONS.—Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) * * *

* * * * * * *

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F); **[**or**]**

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1) (E) or (F)**[**.**]***; or*

(16) any transaction described in subsection (f)(7)(A) in connection with the provision of investment advice described in subsection (e)(3)(B), in any case in which—

(A) the investment of assets of the plan is subject to the direction of plan participants or beneficiaries,

(B) the advice is provided to the plan or a participant or beneficiary of the plan by a fiduciary adviser in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of plan assets, and

(C) the requirements of subsection (f)(7)(B) are met in connection with the provision of the advice.

* * * * * * *

(f) OTHER DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

(1) * * *

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(7) PROVISIONS RELATING TO INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—

(A) TRANSACTIONS ALLOWABLE IN CONNECTION WITH INVESTMENT ADVICE PROVIDED BY FIDUCIARY ADVISERS.—The transactions referred to in subsection (d)(16), in connection with the provision of investment advice by a fiduciary adviser, are the following:

(i) the provision of the advice to the plan, participant, or beneficiary;

(ii) the sale, acquisition, or holding of a security or other property (including any lending of money or other extension of credit associated with the sale, acquisition, or holding of a security or other property) pursuant to the advice; and

(iii) the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof (or any employee, agent, or registered representative of the fiduciary adviser or affiliate) in connection with the provision of the advice or in connection with a sale, acquisition, or holding of a security or other property pursuant to the advice.

(B) REQUIREMENTS RELATING TO PROVISION OF INVESTMENT ADVICE BY FIDUCIARY ADVISERS.—The requirements of this subparagraph (referred to in subsection (d)(16)(C)) are met in connection with the provision of investment advice referred to in subsection (e)(3)(B), provided to a plan or a participant or beneficiary of a plan by a fiduciary adviser with respect to the plan in connection with any sale, acquisition, or holding of a security or other property for purposes of investment of amounts held by the plan, if—

(i) in the case of the initial provision of the advice with regard to the security or other property by the fi-

duciary adviser to the plan, participant, or beneficiary, the fiduciary adviser provides to the recipient of the advice, at a time reasonably contemporaneous with the initial provision of the advice, a written notification (which may consist of notification by means of electronic communication)—

(I) of all fees or other compensation relating to the advice that the fiduciary adviser or any affiliate thereof is to receive (including compensation provided by any third party) in connection with the provision of the advice or in connection with the sale, acquisition, or holding of the security or other property,

(II) of any material affiliation or contractual relationship of the fiduciary adviser or affiliates thereof in the security or other property,

(III) of any limitation placed on the scope of the investment advice to be provided by the fiduciary adviser with respect to any such sale, acquisition, or holding of a security or other property,

(IV) of the types of services provided by the fiduciary advisor in connection with the provision of investment advice by the fiduciary adviser, and

(V) that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice,

(ii) the fiduciary adviser provides appropriate disclosure, in connection with the sale, acquisition, or holding of the security or other property, in accordance with all applicable securities laws,

(iii) the sale, acquisition, or holding occurs solely at the direction of the recipient of the advice,

(iv) the compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property is reasonable, and

(v) the terms of the sale, acquisition, or holding of the security or other property are at least as favorable to the plan as an arm's length transaction would be.

(C) STANDARDS FOR PRESENTATION OF INFORMATION.—The notification required to be provided to participants and beneficiaries under subparagraph (B)(i) shall be written in a clear and conspicuous manner and in a manner calculated to be understood by the average plan participant and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of the information required to be provided in the notification.

(D) EXEMPTION CONDITIONED ON MAKING REQUIRED INFORMATION AVAILABLE ANNUALLY, ON REQUEST, AND IN THE EVENT OF MATERIAL CHANGE.—The requirements of subparagraph (B)(i) shall be deemed not to have been met in connection with the initial or any subsequent provision of advice described in subparagraph (B) to the plan, participant, or beneficiary if, at any time during the provision of advisory services to the plan, participant, or beneficiary, the

fiduciary adviser fails to maintain the information described in subclauses (I) through (IV) of subparagraph (B)(i) in currently accurate form and in the manner required by subparagraph (C), or fails—

(i) to provide, without charge, such currently accurate information to the recipient of the advice no less than annually,

(ii) to make such currently accurate information available, upon request and without charge, to the recipient of the advice, or

(iii) in the event of a material change to the information described in subclauses (I) through (IV) of subparagraph (B)(i), to provide, without charge, such currently accurate information to the recipient of the advice at a time reasonably contemporaneous to the material change in information.

(E) MAINTENANCE FOR 6 YEARS OF EVIDENCE OF COMPLIANCE.—A fiduciary adviser referred to in subparagraph (B) who has provided advice referred to in such subparagraph shall, for a period of not less than 6 years after the provision of the advice, maintain any records necessary for determining whether the requirements of the preceding provisions of this paragraph and of subsection (d)(16) have been met. A transaction prohibited under subsection (c)(1) shall not be considered to have occurred solely because the records are lost or destroyed prior to the end of the 6-year period due to circumstances beyond the control of the fiduciary adviser.

(F) DEFINITIONS.—For purposes of this paragraph and subsection (d)(16)—

(i) FIDUCIARY ADVISER.—The term "fiduciary adviser" means, with respect to a plan, a person who is a fiduciary of the plan by reason of the provision of investment advice by the person to the plan or to a participant or beneficiary and who is—

(I) registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 et seq.) or under the laws of the State in which the fiduciary maintains its principal office and place of business,

(II) a bank or similar financial institution referred to in subsection (d)(4),

(III) an insurance company qualified to do business under the laws of a State,

(IV) a person registered as a broker or dealer under the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.),

(V) an affiliate of a person described in any of subclauses (I) through (IV), or

(VI) an employee, agent, or registered representative of a person described in any of subclauses (I) through (V) who satisfies the requirements of applicable insurance, banking, and securities laws relating to the provision of the advice.

(ii) AFFILIATE.—The term "affiliate" of another entity means an affiliated person of the entity (as defined in section 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(3))).

(iii) REGISTERED REPRESENTATIVE.—The term "registered representative" of another entity means a person described in section 3(a)(18) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(18)) (substituting the entity for the broker or dealer referred to in such section) or a person described in section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) (substituting the entity for the investment adviser referred to in such section).

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VII. DISSENTING VIEWS

We support the effort of the majority to bring before this Committee the issue of improved access to investment advice for millions of American workers. We agree that, in light of the growth of self-directed pension plans, we must take steps to ensure that the 42 million workers who participate in, and are beneficiaries under, such plans have easy access to information designed to help them make better investment choices. However, we are disappointed that an issue of such importance was brought before the Committee in this manner.

The Committee on Education and the Workforce recognized the importance of this issue. Before marking up H.R. 2269 in full Committee, their Subcommittee on Employer-Employee Relations held five hearings between February 15, 2000, and August 2, 2001. On the other hand, this Committee did not hold one single hearing either in Subcommittee or full Committee. We lost a great opportunity to engage in dialogue with the proponents and opponents of this bill regarding the advantages and disadvantages of the approach adopted in H.R. 2269. We remain hopeful there will be an opportunity for us to come together and discuss all the issues, various available options, and agree on the best solution to this problem. This approach is necessary as millions of workers look to us to protect the security of their pension benefits.

While some of us are primarily concerned with only a single provision of the bill, collectively, there are many areas of concern that are addressed herein.

A fundamental premise of our pension law is that people who manage or administer assets of a pension plan cannot engage in any transaction under the plan in which they have a financial or other conflict of interest. These limitations are referred to as the prohibited transaction rules. There are limited statutory and regulatory exemptions from these rules, but only for cases that are determined to be in the best interest of plan participants and beneficiaries. When the prohibited transaction rules were enacted, there was considerable debate concerning whether such transactions should be subject to a complete bar, or if such transactions should be permitted if the plan received adequate compensation. The risks to the integrity of our pension system were considered to be too great if plan transactions involving a financial interest or other conflict were permitted. Thus, a complete bar was adopted.

The financial markets and financial transactions have become far more complicated since the prohibited transaction rules were enacted. In addition, the type of pension plan used by employers to deliver retirement benefits to their workers has changed. We recognize the need to respond to the changing market for pension plans, but we also value the importance of protecting the integrity of our pension system. Because of these tensions, we believe we would all

be better served if we could come to the table and engage in a process that results in legislation that adequately addresses all the issues raised by these competing needs.

Some of our Members believe that no general exemption from the prohibited transaction rules should be permitted. They believe that such an approach has too great a potential for fraud and abuse. They argue that such a change would weaken or eliminate rules designed to prevent abuse of plan participants. Those of us who hold these views regard the disclosure provisions, minimum qualification requirements for advisors, and the availability of independent advice to plan participants when there is conflicted advice as an inadequate substitute for erosion of the protections American workers currently have under the prohibited transaction rules.

Another group of us believe that if certain safeguards are built into the system, an exemption to the prohibited transaction rules is permissible. The approach to ensure the existence of adequate safeguards varies according to the area of greatest concern for the Member. Some of us believe that if there is clear and meaningful disclosure, H.R. 2269 would be acceptable. Others are concerned with the qualification requirements for advisors as contained in the bill. Still others are concerned with the availability of independent advice to plan participants when there is conflicted advice. While some of us are concerned primarily with only a single provision, collectively, there are numerous areas of concerns. These are all addressed below.

1. Disclosure

We are pleased with the changes made to the underlying disclosure provision that were included in the Chairman's substitute to H.R. 2269 as introduced. We acknowledge that these changes will go a long way in providing information to plan participants as they struggle to make the best investments they can among the choice available to them. We hope these changes also are reflected in the provisions of the bill that fall under the Employee Retirement Income Security Act (ERISA) as it is brought to the floor.

Some of us would have preferred to improve a little further the standard adopted by the majority. We would have liked to provide the Department of Labor (DOL) regulatory authority under which it could provide a model disclosure form. This becomes important in light of the fact that the majority of the Committee on Education and the Workforce stated in its committee report views that it intends for the disclosure to be a flexible standard that each advisor would be able to interpret. We find this standard to be unacceptable. We do not believe that such an undeterminable standard was intended by the Members of this Committee. An Amendment that was proposed by Mr. Pomeroy and withdrawn would have ensured that disclosure under the bill followed a uniform standard. Adequate and meaningful disclosure to participants is very important. We believe that disclosure should be honest, straightforward, and uniform. In addition, it is important that disclosure made by electronic means be consistent with regulations issued by the DOL and the Treasury Department.

2. Minimum qualification requirements for advisors

Under H.R. 2269, a fiduciary advisor means a person who is a fiduciary of the plan by reason of providing investment advice to the plan, a participant, or beneficiary, and who is (1) registered as an investment advisor under the Investment Adviser Act of 1940, (2) a bank or similar financial institution, (3) an insurance company, (4) a registered broker or dealer under the Securities Act of 1934, (5) an affiliate of a person described above, or (6) an employee, agent or registered representative of a person described above who satisfies the requirements of applicable law relating to advice.

Those of us who have concerns regarding the qualification standard for investment advisors, as contained in the bill, believe this standard is inadequate for the following reasons. Banks and insurance companies would be permitted to be qualified advisors but are currently exempt from the Investment Advisers Act with respect to providing investment advice. Consequently, in States that do not have any qualification standards applicable to these entities, employees would be permitted to provide investment advice without demonstrating that they meet any level of proficiency in this area.

Because these entities are exempt under the Investment Advisers Act, there is no Federal level of regulation with respect to investment advice. Moreover, regulation at the state level is not uniform. While there are some states, such as California, that require an insurance agent to pass a written examination that is prepared and administered by the state; some states, such as Washington, allow anyone who meets the following requirements to be agents (1) be at least eighteen years of age, (2) be a resident of and actually reside in the state, and (3) be trustworthy and competent.

Further, the bill provides that an affiliate of a qualified entity would be a qualified investment advisor. An affiliate is broadly defined under the Investment Adviser Act to include all employees. Also, the bill specifically provides that an employee, agent, or registered representative of a qualified entity who satisfies the requirements of applicable law relating to advice would be a qualified agent under the law. This provides another opening for employees of banks and insurance companies to act as qualified investment advisors under the bill, without meeting any qualification requirements in some cases.

An amendment offered by Mr. Pomeroy and withdrawn would have ensured that all persons who give investment advice have a license under federal or state law or be registered with the Department of Labor. By doing so, the Pomeroy amendment would have provided an administrative remedy—i.e. the prospect of losing one's license—to ensure that advisers fulfill their fiduciary duties.

We believe it is imperative to ensure that only trained qualified persons provide investment advice to plan participants. The integrity of our pension system is too important. To permit a lesser standard here than we would in any other area involving investment advice would directly undermine the integrity of our pension system. We are hopeful that as the bill moves through the legislative process our negotiations in this area will bring us to an acceptable middle ground.

3. Availability of independent advice

With regard to the need to provide plan participant with independent advice, under the plan, when there is conflicted advice, some of us do not believe that the advisor who was selected by the employer to provide investment advice to the plan, participants and beneficiaries should be forced to share the contract with a competitor. Others among us believe that if we are permitting advisors to give conflicted advice to plan participants, we should ensure that they have the ability to receive non-conflicted advice. The latter group believes that if this option is not present, the claim that we are providing plan participants access to investment advice is nothing more than an empty promise.

Those of us who have concerns in this area do not believe that the only choice for plan participants should be to accept conflicted advice or go without any advice. Such a standard is not in the best interest of the plan participants or the beneficiaries. Yet, these are the very people proponents argue this bill is intended to help.

Some who oppose this modification have argued that advice is never truly free of conflict. We have a different view on this issue. Current law allows a plan sponsor to obtain investment advice from one of about twenty firms which provide this service, mainly through the internet. The fact that these independent firms do not sell their own products, nor do they earn differential fees for the investment options recommended provides an important element of protection against workers receiving conflicted advice.

The investment advice firms currently evaluate all the investment options under the plan. They then make recommendations to the plan participants based on the overall rating of the investment fund, and recommend the options they think are best. This has led some financial service firms to express dissatisfaction with some of these firms. In some cases, the financial service firm may conclude that the investment advice firm is not recommending a sufficient amount of their products or is not promoting the funds that generate the highest profits. While we understand and appreciate the frustration some of these financial service firms have experienced, we must be careful not to minimize the element of independence that is so vital to the integrity of our pension system.

Some of us have concerns in this area but would choose a different approach. Under this alternative approach, we would design a provision to ensure that there is a sufficient level of diversity among the investment options available under the plan. We believe such an approach would diminish the potential for abuse. To be successful with this approach, it would be necessary to preclude the plan from receiving conflicted advice. Thus, the exemption from the prohibited transaction rules would not apply to the plan, as currently permitted under H.R. 2269. Rather, the exemption would be limited to plan participants and beneficiaries under the plan, as was included in the Democratic Substitute that was offered by Rep. Robert Andrews in the markup held by the Committee on Education and the Workforce.

Such an approach would preclude a certain level of bias with respect to the investment funds offered by the plan. We believe that ensuring diversity among the products as well as among the different companies whose products are offered under the plan can go

a long way to diminish the harm that could result with conflicted advice. This standard will ensure that more meaningful advice is received by plan participants.

4. Remedies available upon a breach of fiduciary duties

There are a few of us who believe steps must be taken to ensure that plan participants are empowered within a system that permits conflicted advice. One of the ways we believe this can be accomplished is by expanding available remedies in the case of a fiduciary breach.

The remedies available to plan participants under ERISA have not kept pace with the changing face of our pension system. ERISA was enacted at a time when pension plans were predominantly defined benefit plans. The remedies available under ERISA are designed to respond to a defined benefit plan structure. With the explosion of defined contribution plans and the creation of individual accounts under these plans it is now possible to measure the financial loss a plan participant has suffered as a result of a fiduciary breach. However, no modification of the current structure has been made.

Today, twenty five years after the enactment of ERISA, the courts remain unresolved as to what damages are permitted to the participant of a defined contribution plan who has suffered harm as a result of a fiduciary breach. The ERISA provision which gives an individual participant a cause of action (section 502(a)(3)) limits recovery to loss suffered by the plan.

This is a time when every effort should be made to enhance the right of recovery for plan participants. Yet, under the bill, only the current limited form of recovery would be continued. We do not believe that, given the significant changes being made to workers' protections provided under the prohibited transaction rules, the current form of remedies is adequate. We believe it is important to enhance the ability of injured participants to recover some of the economic loss suffered resulting from a breach of fiduciary duty.

In conclusion, we would again state that we agree there is a need to get improved access to investment advice to the millions of workers who participate in self-directed pension plans. We agree with the majority that this need must be addressed. However, in light of the comments expressed above, we believe that the approach taken under H.R. 2269 has some major problems that must be addressed if we are to move forward on this issue in a meaningful way. We hope that our majority will give us the opportunity to engage in discussion and design an approach to this need that responds to the many competing interests presented here.

CHARLES B. RANGEL.
WILLIAM J. JEFFERSON.
XAVIER BECERRA.
JIM MCDERMOTT.
JOHN LEWIS.
PETE STARK.
LLOYD DOGGETT.
SANDER LEVIN.
KAREN L. THURMAN.
ROBERT T. MATSUI.

WILLIAM J. COYNE.
JERRY KLECZKA.
BEN CARDIN.
EARL POMEROY.

VIII. ADDITIONAL VIEWS

As our pension system continues to move toward a system that favors defined contribution plans over defined benefit plans, the need for plan participants to have sophisticated investment advice to assist them to prepare for their retirement becomes increasingly imperative. H.R. 2269 as reported from the Education and Workforce Committee represents a reasonable, but flawed, attempt to fill this need.

Any break in ERISA's fiduciary rules gives rise to the concern that investment advice may be given without the sole interest of the individual plan participant in mind. Ensuring that this is not an unintended result constitutes an a priori condition for passage of any bill, and the proponents of this bill must demonstrate that they have done all they can to prevent such an occurrence. The Education and Workforce bill fails to accomplish this in two areas: adequate disclosure, and licensing.

The Substitute offered by Chairman Thomas adequately addresses the former problem. The Substitute imposes additional disclosure requirements on investment advisors that improve the information disclosed to participants as they consider investment options that have an element of self-interest for the advisor. While additional protections might be helpful, such as requiring disclosure each time the advice is given and requiring that employers provide independent advisors when it is requested by a plan participant, the disclosure standards in the Chairman's mark meets the minimum acceptable level.

Unfortunately, this is not true of the standard governing qualification of investment advisors. As reported by both the Education and Workforce Committee and the Committee on Ways and Means, some individuals with no special training or qualifications could provide investment advice to plan participants because certain financial institutions are exempt from the Investors Advisers Act as it pertains to investment advice, and not all States have filled in this gap. In addition, the statutory definition of "affiliate" in the Investment Advisers Act is so broad that any employee could give the advice. This standard provides an incentive for advice to be offered by less qualified individuals, which would be less expensive for the companies providing the service.

This problem could have been solved by an amendment offered but withdrawn by a Democratic Member, Mr. Pomeroy of North Dakota. His amendment would have required an employer to provide an advisor who is licensed under state or federal law. However, employees of bank trust departments—a common source for investment advisors—are not subject to licensure requirements. Apparently, some believe it would be too great a burden to require their employees to meet minimum licensing requirements that would be prescribed by the Secretary of Labor.

I supported final passage of the Ways and Means Committee version of H.R. 2269. I strongly hope that Mr. Pomeroy will be able to work out an agreement with the Chairman of the Committee for stronger licensing agreements. I also hope that the disclosure standards adopted in the Chairman's substitute will be reflected in the ERISA provisions of the bill when H.R. 2269 is brought to the House floor. Should disclosure standards be weakened, or licensing standards not be added, I reserve the right discontinue by support.

RICHARD E. NEAL.

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